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No. _____

IN THE

Supreme Court of the United States

October Term, 1987

THERESA MIERA, J. D. SANCHEZ, EDWARD LEYBA, JUDI MESTAS and FELIX DURAN,
Petitioners,

v.

TERESA GARCIA, a minor, by her next friends Max and Sandra Garcia,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether law is clearly established so as to prevent the grant of qualified immunity to public school officials, where two courts of appeals are in direct conflict as to whether a substantive due process cause of action arises from allegedly excessive corporal punishment of students, and the Supreme Court has previously declined to resolve the issue?

2. Whether the openness of the public schools and the availability of state law remedies preclude federal judicial scrutiny of individual incidents of allegedly excessive public school corporal punishment under a substantive due process standard?

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THERESA MIERA, J. D. SANCHEZ, EDWARD LEYBA, JUDI MESTAS and FELIX DURAN,
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v.

TERESA GARCIA, a minor, by her next friends Max and Sandra Garcia,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners Theresa Miera, J. D. Sanchez, Edward Leyba, Judi Mestas and Felix Duran respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on April 28, 1987, as to which a timely motion for rehearing was denied on July 16, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 817 F.2d 650 (10th Cir. 1987), and is reprinted in the appendix hereto, p. A-1, *infra.*

The opinion of the United States District Court for the District of New Mexico, (Campos, J.), has not been reported. It is reprinted in the appendix hereto, p. B-1, *infra.*

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §§ 1983 and 1985, the respondent brought this suit in the District of New Mexico. On April 4, 1985, the district court granted summary judgment to the petitioners, finding they had qualified immunity as to respondent's substantive due process claim, were entitled to judgment both on the merits and on the qualified immunity defense as to procedural due process, and were entitled to dismissal of the pendent personal injury claims. *See* p. B-13, *infra.*

The Court of Appeals for the Tenth Circuit considered only the district court's disposition of the qualified immunity issue. On April 28, 1987, the Court of Appeals reversed the district court and found (a) that excessive corporal punishment in a public school implicated substantive due process rights under the Fourteenth Amendment, (b) that the law concerning the existence of this substantive due process cause of action was settled, thereby rejecting petitioners' qualified immunity defense and (c) that the allegations of the complaint satisfied the standards for such a cause of action. *See* pp. A-1 through A-15, *infra.*

Petitioners' petition for rehearing with suggestion for rehearing *en banc* was denied by the Court of Appeals for the Tenth Circuit on July 16, 1987, p. C-1, *infra.*

The jurisdiction of this Court to review the judgment of the Court of Appeals for the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New Mexico State Board of Education Regulation No. 81-3, Section IIIB3

"3. **Corporal Punishment.** Each local school board shall determine whether to permit the use of corporal punishment and shall publish and distribute a written policy either authorizing or prohibiting its use. Where corporal punishment is authorized, the written policy shall specify the allowable forms of punishment, the conditions under which it may be used and the procedures to be followed in administering it.

A school board policy authorizing corporal punishment will override any parent's objection to its use unless the local board also authorizes individual parents to veto corporal punishment of their children. Where a local board has not authorized a parental veto, an administrative authority may in any event decline to apply corporal punishment if (s)he has reason to believe that an individual student is physically or emotionally unable to withstand reasonable corporal punishment or if (s)he believes that corporal punishment would be ineffective or inappropriate for that student".

Board of Education of the Penasco Independent School District
Regulation No. 4.18

"4.18 **Discipline**

Each instructor is expected to handle his/her own discipline. There may be cases when help from the principal is necessary. The instructor should describe the pupil's behavior to the principal or his/her designee with the pupil present, if practical. Corporal punishment may be administered only by the principal and must be witnessed by a member of the staff or the administration. Corporal punishment by the principal may be administered only with a paddle designated for that purpose by the principal and shall be administered on the buttocks of the student. Spanking shall not exceed five swats per occurrence nor in one day. A written record of all spankings must be kept by the principal."

STATEMENT OF THE CASE

Petitioners are administrators and teachers in the Penasco Independent School District, located in a small rural town in northern New Mexico. At all material times the Penasco School District permitted corporal punishment of students according to its regulation promulgated pursuant to a regulation of the New Mexico State Board of Education, pp. 3-4, *supra.*

Petitioner Miera, the principal, administered corporal punishment to the respondent on two occasions. The first paddling occurred in 1982 when respondent was a nine year old third grade student; the second occurred some 15 months later, when respondent was a fourth grader. The first incident resulted from respondent's altercation with a smaller boy and the second resulted from her involvement in initiating or spreading gossip about her teacher, pp. A-2, A-3, *infra.*

After the second paddling, the plaintiff filed suit under 42 U.S.C. § 1983 claiming violation of her procedural and

substantive due process rights. She also alleged pendent personal injury claims. (A separate claim under 42 U.S.C. § 1985(2) was abandoned, p. B-2, *infra,* n.1). Relying on qualified immunity as an affirmative defense to the due process claims, petitioners moved for summary judgment.[1]

Addressing the respondent's substantive due process claim, the district court first noted the conflict between the Court of Appeals for the Fifth Circuit in *Ingraham v. Wright,* 525 F.2d 909 (5th Cir. 1976) (*en banc*), *aff'd on other grounds,* 430 U.S. 651 (1977) and the Court of Appeals for the Fourth Circuit in *Hall v. Tawney,* 621 F.2d 607 (4th Cir. 1980). The court then held that

> "[t]hese two diverse Circuit Court opinions indicate that the law governing whether excessive corporal punishment can give rise to a substantive due process claim is not clearly established. The Fourth Circuit answers yes; the Fifth Circuit answers no. The Tenth Circuit has not addressed this question. The Supreme Court reviewed the Fifth Circuit case in *Ingraham v. Wright,* 430 U.S. 651 (1977), but expressly declined review of the substantive due process issue,"

p. B-5, *infra.*

That lack of clearly established law led the district court to grant the petitioners' motion for summary judgment on the

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[1] Petitioners initially moved to dismiss the substantive due process claim on the ground that applicable precedents did not recognize such a cause of action. This motion was denied by the district court without analysis. However, the district court "certified for interlocutory appeal the issue of the viability of Plaintiff's substantive due process claim, citing 'substantial ground for difference of opinion' ", p. B-6, *infra,* n.3. The Tenth Circuit declined to hear the appeal. The Defendants then amended their answer to assert qualified immunity.

substantive due process claim because of their qualified immunity, p. B-6, *infra.* The district court did not rule on the merits of the claim.

The district court resolved respondent's procedural due process claim by finding that New Mexico afforded adequate common law remedies to satisfy procedural due process. The court went on to say that if such remedies were not adequate, the law concerning their unavailability was not clearly established, thus entitling the petitioners to qualified immunity. In any event, the court found that in this case the principal's pre-paddling interviews and investigations independently satisfied the requirements of procedural due process and therefore granted summary judgment on the merits, p. B-12, *infra.* The district court exercised its discretion and dismissed the pendent state law claims, p. B-12, *infra.*

On appeal, the Court of Appeals for the Tenth Circuit only considered the district court's ruling on the qualified immunity defense to the respondent's substantive due process claim, pp. A-2, A-10, *infra.* The Court of Appeals accepted the respondent's allegations as true and stated the facts in the light most favorable to her as "reconstructed" from the complaint, affidavits and depositions, p. A-2, n.1, *infra.* The respondent alleged that at the first paddling petitioner Sanchez held her upside down by her ankles while petitioner Miera struck her five times on the front of her leg, producing a two inch cut that left a permanent scar. She alleged that the second paddling resulted in severe bruises which did not stop hurting for two or three weeks, pp. A-3, A-4, *infra.*[2]

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[2] The petitioners vigorously deny these allegations. The record discloses that the only treatment required for the cut observed after the first paddling was application of hydrogen peroxide and a bandaid. The only treatment prescribed after the second paddling was hot soaks as needed. The bruises alleged to have resulted from the second paddling cleared up

(Cont. on p. 7)

Following its factual recitation, the Court of Appeals reversed the district court's grant of qualified immunity as to both the first and second paddling. The Court of Appeals first considered "the governing law" and determined that "at some point, excessive corporal punishment violates the pupil's substantive due process rights", pp. A-5, A-10, *infra.* This holding is "require[d]" by the Supreme Court's determination in *Ingraham, supra,* despite the Court's "explicit disclaimer" that the issue was not before it, pp. A-4, A-5, *infra.* Thus, the Court of Appeals read *Ingraham* as if it "signaled" the existence of a substantive due process cause of action which was "implicit" in the decision, pp. A-6, A-13, *infra.*

The Court of Appeals for the Tenth Circuit noted that the Court of Appeals for the Fourth Circuit had recognized the substantive due process cause of action in *Hall v. Tawney, supra,* and that the Court of Appeals for the Fifth Circuit's decision in *Ingraham* is "[t]he only appellate decision to the contrary", p. A-8, *infra.* The Court of Appeals for the Tenth Circuit observed that in *Milonas v. Williams,* 691 F.2d 931 (10th Cir. 1982), *cert. den.*, 460 U.S. 1069 (1983), decided between the two paddlings, it had enjoined a form of disciplinary action nicknamed the "hair dance" in a school for "involuntarily confined" problem children as violating "the plaintiffs' due process rights", p. A-7, n.5 and text, *infra.* The present decision, in the Court of Appeals for the Tenth Circuit's view, merely "reaffirm[ed]" its holding in *Milonas,* p. A-8, *infra.*

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2 (Cont. from p. 6)
spontaneously, as did the minimal lower back strain. The district court found that respondent admitted an infraction on each occasion and that petitioner Miera's investigation satisfied procedural due process, p. B-10, *infra.* The respondent resisted each paddling both physically and verbally, on one occasion telling petitioner Miera that her father said she had "better shape up", p. A-3, *infra.*

The Court of Appeals for the Tenth Circuit adopted the Court of Appeals for the Fourth Circuit's definition of the substantive due process tort but held that the element of malice "is largely redundant," pp. A-8, A-9, n.7, *infra.* In addition, careful adherence to the local punishment regulation "does not create a . . . constitutional safe harbor", p. A-12, n.9, *infra,* and is not "determinative" that substantive due process has not been violated, *id.*

Having determined the applicable law, the Court of Appeals for the Tenth Circuit next addressed whether that law "was established with sufficient clarity at the time of the beating incidents at issue here", p. A-10, *infra.* The Court of Appeals for the Tenth Circuit acknowledged that "a direct conflict exists between the Fourth Circuit in *Hall,* which has rejected, and the Fifth Circuit in *Ingraham*, which has upheld, the constitutionality of grossly excessive corporal punishment", p. A-14, *infra.* While finding that this conflict is "relevant" to the qualified immunity analysis, it was not "controlling" since "the decisions of one circuit court of appeals are not binding upon another circuit", *id.*

The Court of Appeals for the Tenth Circuit observed that "*Harlow* declined to define how 'the opinions of this Court, [or] of the Courts of Appeals' . . . should be evaluated in determining what is clearly established" and that "'lower courts are not informed whether two conflicting opinions from different district courts, or even a split decision in the court of appeals, makes the law sufficiently unclear to mandate the granting of immunity' ", p. A-14, n.11, *infra.*

Although citing holdings that "officials need not 'predic[t] the future course of constitutional law' ", p. A-12, *infra,* the Court of Appeals for the Tenth Circuit held that "[d]espite the Fifth Circuit's position, we believe the law was clearly established before *Milonas* that some high level of force in a corporal punishment context would violate a child's substantive

due process rights" and that "a reasonably competent legal advisor to a school district should have realized" the state of the law, p. A-14, *infra.* Similarly, the Supreme Court's "refusal in *Ingraham* to address the substantive due process claim does not, without more, mandate a conclusion that the law was not clearly established", p. A-13, *infra.* The Court of Appeals therefore denied qualified immunity as to the first paddling, p. A-15, *infra.*

While acknowledging "a closer question" as to the first paddling, p. A-13, *infra,* the Court of Appeals for the Tenth Circuit held that the *Milonas* decision, coming between the two paddlings, "clearly established that excessive corporal punishment could deny substantive due process", and denied qualified immunity as to the second paddling also, p. A-12, *infra.* The Court of Appeals adopted a standard requiring "some but not precise factual correspondence" coupled with the "demand[] that officials apply general, well developed legal principles", p. A-12, *infra,* under which *Milonas* was "sufficiently analogous to the facts of this case", p. A-13, *infra.* While agreeing that *Milonas* dealt with punishment of "problem children" who were "involuntarily confined", the Court of Appeals held that the "elements of compulsory school attendance" in the present case enhanced "*Milonas*' precedential value", p. A-7, n.5 and text, *infra.*

Although the district court had not addressed the question whether the plaintiff's allegations made out a substantive due process claim, the Court of Appeals held that the respondent's "allegations and facts recited above, if believed by the trier of fact, would establish a constitutional wrong for which [respondent] could recover", p. A-4, *infra.*

Petitioners timely moved for rehearing of the Court of Appeals for the Tenth Circuit's decision, with a suggestion of *en banc* review. The petition for rehearing and for consideration *en banc* was denied, p. C-1, *infra.*

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FOR THE TENTH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY IN THE FACE OF A DIRECT CONFLICT BETWEEN TWO COURTS OF APPEALS DEPARTS (a) FROM THIS COURT'S TEACHINGS AND (b) FROM THE HOLDINGS OF OTHER CIRCUIT COURTS.

The decision of the Court of Appeals for the Tenth Circuit denying qualified immunity disregards this Court's teachings concerning the purpose of the qualified immunity defense and the standards by which it is granted. In holding that a "direct conflict" between two courts of appeals, coupled with an "explicit disclaimer" by this Court, pp. A-13, A-14, *infra,* do not evidence unsettled law, the Court of Appeals for the Tenth Circuit significantly weakens the qualified immunity doctrine which this Court has painstakingly crafted in the course of numerous decisions. This petition offers an opportunity to correct this departure and provide guidance to the courts of appeals.

In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), this Court identified qualified immunity "as the best attainable accommodation of competing values", *id.,* at 814, striking a balance between litigants' entitlement to "vindication of constitutional guarantees" and the social costs arising from the "diversion of official energy from pressing public issues" and from the "unflinching discharge of their duties", *id.* The touchstone of this balance is the doctrine that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known", *id.,* at 818.

The determination of the state of the law is to be made prior to trial:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.

Id., at 818.

In *Davis v. Scherer*, 468 U.S. 183 (1984), this Court again emphasized that "[e]ven defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard", *id.*, at 190. Other than the "objective reasonableness" of an official's conduct as measured by reference to clearly established law, "[n]o other 'circumstances' are relevant to the issue of qualified immunity", *id.*, at 191.

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court held that the "decisive fact" determining entitlement to qualified immunity is not that the official's position on the law "turned out to be incorrect, but that the question was open at the time he acted", *id.*, at 535. To deny qualified immunity because an official "gambled and lost on the resolution of this open question departs from the principles of *Harlow*. Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected", *id.* Officials "are not subject to suit when such questions are resolved against them only after they have acted", *id.*

In *Malley v. Briggs*, 475 U.S.___, 89 L.Ed.2d 271 (1986), this Court held that qualified immunity is designed to protect "all but the plainly incompetent or those who knowingly violate the law", 89 L.Ed.2d at 278. In regard to the apparent

lawfulness of a groundless warrant, it is sufficient for qualified immunity "if officers of reasonable competence could disagree on this issue . . .", *id.*

This Court's recent decision in *Anderson v. Creighton*, 483 U.S.___, 97 L.Ed.2d 523 (1987), emphatically reiterated many of these teachings and rejected the tendency of some lower courts to deny qualified immunity simply because an abstract constitutional principle is clearly established.[3] This Court held that the "contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right", 97 L.Ed.2d at 531, (emphasis added). In order to deny qualified immunity, "in the light of pre-existing law, the unlawfulness must be apparent", *id.* The doctrine of qualified immunity reflects a balance that has been struck "across the board", meaning that "the scope or extent of immunity [will not] turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated", *id.*, at 532, 533. An immunity "that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide", *id.*, at 533.

Notwithstanding these teachings, the Court of Appeals for the Tenth Circuit holds that the law creating a substantive due process cause of action for public school corporal punishment

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[3] It is not clear whether the Court of Appeals for the Tenth Circuit considered *Anderson v. Creighton* in denying rehearing. The Court of Appeals was advised of the June 25, 1987 decision by letter to the clerk mailed July 2, 1987. Additional copies were mailed at the clerk's request on July 7, 1987 since the petition also suggested consideration *en banc*. The Court of Appeals denied rehearing by order dated July 16, 1987, without indicating whether or not it considered *Anderson v. Creighton*, p. C-1, *infra*.

is clearly established while paradoxically it simultaneously acknowledges a "direct conflict" between the Courts of Appeals for the Fourth and Fifth Circuits on this very question, p. A-14, *infra.*[4] Similarly, while acknowledging this Court's "explicit disclaimer" in *Ingraham* that it was not deciding whether public school corporal punishment could give rise to a substantive due process cause of action,[5] the Court of Appeals discerns a "signal[]" in *Ingraham* sufficiently clear to put a reasonable school official on notice that excessive corporal punishment implicated substantive due process rights, p. A-6, *infra.* The Court of Appeals' expectation that school officials must delve beyond this Court's explicit disclaimer in *Ingraham* to arrive at its "implicit" intent,[6] p. A-13, *infra,* strains the concept of "clearly established law".

While correctly recognizing that "officials need not 'predic[t] the future course of constitutional law'", p. A-12, *infra,* the Court of Appeals holds the petitioners accountable for failing to anticipate whether it would side with the Court of

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[4] The conflict could not be more evident since each circuit has acknowledged the other's divergent holding yet has declined to modify its own, *see, Woodard v. Los Fresnos Independent School District,* 732 F.2d 1243, 1246 (5th Cir. 1984), and *Hall v. Tawney,* 621 F.2d 607, 612 (4th Cir. 1980).

[5] *Ingraham v. Wright,* 430 U.S. 651, 679, n.47 (1977). This Court's "disclaimer" could not have been clearer: "We have no occasion in this case, *see supra* at 659, 51 L.Ed.2d 723, n.12, to decide whether or in what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause".

[6] Indeed, if there is any "implicit" message to be derived from *Ingraham* in this regard, it is Mr. Justice White's assertion in dissent that the majority analysis negates the possibility of a substantive due process cause of action arising from public school corporal punishment, *Ingraham, supra,* at 689, n.5 (White, J., dissenting).

Appeals for the Fourth Circuit rather than the Court of Appeals for the Fifth Circuit. To conclude that an objectively reasonable school official can ascertain the state of the law where two courts of appeals differ on the very existence of the cause of action, and where the Supreme Court has expressly declined to resolve the conflict, erodes the qualified immunity defense to a near nullity. If a disagreement among officers of reasonable competence mandated qualified immunity in *Malley v. Briggs, supra,* surely the disagreement between the Fourth and Fifth Circuits, acknowledged by both the district court and Court of Appeals for the Tenth Circuit here, compels the same result.

The concern of the Court of Appeals for the Tenth Circuit that it cannot "prospectively articulate constitutional standards", p. A-11, n.8, *infra,* if it grants qualified immunity, is misplaced. *Harlow v. Fitzgerald, supra,* specifically recognized that the court may "determine . . . the currently applicable law" even as it grants qualified immunity, *id.*, at 818. In its present decision, the Court of Appeals for the Tenth Circuit does articulate a detailed substantive due process cause of action arising from public school corporal punishment.[7] However, in order to deny the petitioners what it perceives to be "'one liability-free violation' of the Constitution", p. A-11, n.8, *infra,* the Court of Appeals styles this newly-promulgated cause of action a mere "reaffirm[ance]" of its earlier holding in *Milonas v. Williams, supra,* p. A-8, *infra.*[8] The Court of Appeals'

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[7] Whether the cause of action articulated by the Court of Appeals for the Tenth Circuit comports with this Court's teachings as to substantive due process is discussed in Point II, *infra.*

[8] *Milonas v. Williams* was decided between the two paddlings. Even the Court of Appeals for the Tenth Circuit acknowledges that it had not ruled concerning substantive due process at the time of the first paddling, p. A-13, *infra.* Therefore, the Court of Appeals' concession that its denial of qualified immunity as to the first paddling is "a closer question", p. A-13, *infra,* understates the dearth of foundation for that portion of its decision.

statement that its present analysis of a "public school child's substantive due process rights" was previously "set out in *Milonas*", p. A-8, *infra*, is simply inaccurate; *Milonas* makes no mention whatsoever of the public schools in this regard.

There is no way that a reasonably objective public school official could have discerned from *Milonas v. Williams* that excessive public school corporal punishment gives rise to a substantive due process cause of action. *Milonas*, in its factual context and in the precedents on which it relies, invokes the substantive due process right of the involuntarily confined and of pre-conviction arrestees to be free from conditions or treatment amounting to punishment, *see, Youngberg v. Romeo*, 457 U.S. 307 (1982), and *Bell v. Wolfish*, 441 U.S. 520 (1979), cited in *Milonas*, 691 F.2d at 942. *Milonas* does not even mention, let alone resolve, the conflict between the Courts of Appeals for the Fourth and Fifth Circuits over the existence of a substantive due process cause of action arising from public school corporal punishment. In contrast, the case defining the constitutional parameters of permissible public school corporal punishment is *Ingraham*. *Ingraham*, the decision which would guide the actions of reasonable public school officials, sanctions the punishment of public school children who are neither involuntarily confined nor subject to criminal charges, and expressly declines to determine whether excessive punishment implicates substantive due process rights.

The Court of Appeals for the Tenth Circuit sees an analogy between compulsory public school attendance laws, p. A-7, n.5, *infra*, and the "detention facility" environment of *Milonas*, *see*, 691 F.2d at 935. This is a substantial departure from *Ingraham*, where this Court acknowledged that public school attendance may not always be voluntary but "the public school remains an open institution", 430 U.S. at 670. This openness, coupled with the "supervision [of public schools] by the community afford significant safeguards" sufficient to deal with the

perceived "low incidence of abuse", *id.*, at 670, 678, n.46. Thus, "common-law constraints will . . . effectively remedy and deter excesses", *id.*, at 670. *Ingraham* recognizes the traditional place of corporal punishment in public school education and the privilege accorded reasonable corporal punishment, leading to the conclusion that "[t]he prisoner and the school child stand in wholly different circumstances . . .", *id.*, at 669, 670.

The "precedential value" of *Milonas* discerned by the Court of Appeals for the Tenth Circuit, p. A-7, n.5, *infra*, depends heavily on a formulation in the present case which is itself promulgated for the first time. The relevance of *Milonas* for qualified immunity purposes is based on a newly-adopted test of "some but not precise factual correspondence" coupled with a "demand[] that officials apply general, well developed legal principles", p. A-12, *infra*. To the extent this test looks to "general, well developed legal principles" in determining established law, it runs afoul of the holding in *Anderson v. Creighton*, *supra*, that the contours of rights must have been "'clearly established' in a more particularized, and hence more relevant, sense", 97 L.Ed.2d at 531. Prior to this formulation in the present opinion, there was no way that reasonable school officials could have known that *Milonas* was construed to recognize a substantive due process cause of action arising from public school corporal punishment.

At least two courts of appeals and one district court have concluded, contrary to the decision of the Court of Appeals for the Tenth Circuit, that conflicts among circuits or lower courts mandate a finding that applicable law is unsettled, *see*, *Zweibon v. Mitchell*, 720 F.2d 162, 171 (D.C. Cir. 1983), *cert. den.*, 469 U.S. 880, *reh. den.*, 469 U.S. 1068 (1984) ("Mitchell could reasonably have relied on *other* lower court decisions in which warrantless national security surveillances were held permissible"), *Benson v. Allphin*, 786 F.2d 268, 275, n.16 (7th Cir. 1986), *cert. den.*, __U.S.__, 93 L.Ed.2d

109 (1986) ("Of course, if there is a conflict among the circuits, one must await the definitive resolution by the Supreme [C]ourt"), and *Souders v. Kroboth*, 547 F. Supp. 187, 189 (E.D. Pa. 1982) ("Because a conflict presently exists among the circuits concerning the applicability of the exclusionary rule to parole revocation proceedings [cite omitted], I conclude that defendants are immune from liability for damages . . .").

The observation by the Court of Appeals for the Tenth Circuit that a "reasonably competent legal advisor" to a school district should have known with certainty that excessive punishment would be actionable, p. A-14, *infra*, also misapprehends the standard. This Court has made it clear that the issue is what "officers of reasonable competence" would have believed, not their attorneys, *Malley v. Briggs*, *supra*, at 278.

This Court's teachings in case after case since *Harlow v. Fitzgerald*, *supra*, evidence its belief that qualified immunity serves an important societal purpose, encouraging officials to act forthrightly while balancing concern for the constitutional rights of the citizenry. The decision of the Court of Appeals for the Tenth Circuit, disregarding the impact of a "direct conflict" between the circuits, suggests a basic misapprehension of the doctrine which, if allowed to stand, will significantly weaken it.

II. THE COURT OF APPEALS FOR THE TENTH CIRCUIT'S RECOGNITION OF A SUBSTANTIVE DUE PROCESS CAUSE OF ACTION FOR PUBLIC SCHOOL CORPORAL PUNISHMENT (a) CONFLICTS WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT AND (b) RAISES VITAL ISSUES CONCERNING FEDERAL COURT SCRUTINY OF PUBLIC SCHOOL DISCIPLINARY DECISIONS.

A. The Court of Appeals for the Tenth Circuit's Recognition of a Substantive Due Process Cause of Action for Public School Corporal Punishment Conflicts with the Decisions of the Court of Appeals for the Fifth Circuit and Impermissibly Dilutes the Constitutional Tort.

In *Ingraham v. Wright*, this Court expressly stated that it had no occasion to consider "whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause", 430 U.S. 651, 679, n.47 (1977). The Court refused certiorari as to whether "the infliction of severe corporal punishment upon public school students [is] arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment[.]", *id.*, at 659, n.12. This left standing the determination of the Court of Appeals for the Fifth Circuit that it

> "refused to look at each individual instance of punishment to determine if it had been administered arbitrarily or capriciously. We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state

> court against a teacher who has excessively punished a child."

Ingraham v. Wright, 525 F.2d 909, 917 (5th Cir. 1976) (*en banc*), *aff'd on other grounds*, 430 U.S. 651 (1977).

In dissent, a minority of the Court of Appeals for the Fifth Circuit rejected the majority holding, 525 F.2d at 925. They argued that the "excessive and severe corporal punishment disclosed by the plaintiff's evidence . . . amounts to a denial of substantive due process of law", *id.*, at 926.

The view of the dissenting judges on the Court of Appeals for the Fifth Circuit was adopted as the majority view by the Court of Appeals for the Fourth Circuit in *Hall v. Tawney*, *supra*. While it noted that the majority view in the Court of Appeals for the Fifth Circuit was that the "federal constitutional right could not be made to turn upon relative levels of severity of specific, perhaps unauthorized, incidents of corporal punishment", *id.*, at 612, the Court of Appeals for the Fourth Circuit concluded, as had the dissenting judges of the Court of Appeals for the Fifth Circuit, that it was not "an abuse of our judicial power to determine whether punishment inflicted in a particular case exceeds constitutional limits", *id.*

In the present case, the Court of Appeals for the Tenth Circuit has acknowledged a "direct conflict" between the two circuits, p. A-14, *infra*, and has ostensibly adopted both the position of the Court of Appeals for the Fourth Circuit and its test of the substantive due process violation:

> "As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted

> to a brutal and inhumane abuse of official power literally shocking to the conscience."

pp. A-8, A-9, *infra,* quoting *Hall v. Tawney,* 621 F.2d at 613.

There are two reasons why this portion of the decision should be reviewed. The first is the clear conflict between the Courts of Appeals for the Fifth Circuit and the Fourth and Tenth Circuits. An estimated 1.5 million children are paddled in public schools every year, *Newsweek,* June 22, 1987, p. 61. The same acts of corporal punishment may implicate substantive due process rights in the Fourth and Tenth Circuits but will be dismissed out of court in the Fifth Circuit. Resolution of this conflict will help determine the extent to which public school disciplinary determinations will be subjected to federal court scrutiny.

Assuming this Court finds that excessive corporal punishment implicates a substantive due process right, an additional and equally important reason to review this case is to correct the Court of Appeals for the Tenth Circuit's significant departure from the definition of the substantive due process violation articulated by the Court of Appeals for the Fourth Circuit in *Hall v. Tawney, supra.* That court made clear that a substantive due process violation stemming from excessive corporal punishment requires a three-fold showing: one, sufficiently severe injury; two, sufficient disproportion to the need presented, *and,* finally, malicious motivation. In contrast, the Court of Appeals for the Tenth Circuit has deemed the element of malice to be "largely redundant", since it will be derived from the magnitude of the other two elements, p. A-9, n.7, *infra.* While the Court of Appeals for the Tenth Circuit purports to adopt the Fourth Circuit's formulation, by defining motivation in terms of the severity and the disproportion of the injuries, it has, in effect, collapsed the element of malice into the remaining two criteria. In speaking of malice or sadism, the Tenth Circuit explained:

> "this element is largely redundant, because whenever 'the force applied caused injury so severe, was so disproportionate to the need presented, and . . . amounted to a brutal and inhumane abuse of official power literally shocking to the conscience,' we should presume that the defendant had the requisite state of mind".

p. A-9, *infra*, n.7.

If the Court of Appeals for the Tenth Circuit's formulation is permitted to stand, the important distinction between a constitutional deprivation and a tort will be obliterated. This Court made clear in *Paul v. Davis*, 424 U.S. 693 (1976), its concern lest the Fourteenth Amendment become "a font of tort law", at 701. This Court reiterated its concern about trivializing the Constitution by elevating simple torts into constitutional deprivations in *Daniels v. Williams*, 474 U.S.___, 88 L.Ed.2d 662, 670 (1986). By seriously diluting the elements of a substantive due process claim, the Court of Appeals for the Tenth Circuit has ignored the emphatic observation of the Court of Appeals for the Fourth Circuit that "the substantive due process claim is quite different than a claim of assault and battery under state tort law", *Hall v. Tawney*, *supra*, at 613.

In summary, three circuits have expressed three different views about the scope of protection afforded by the due process clause. They range from the Court of Appeals for the Fifth Circuit's refusal to recognize a substantive due process claim stemming from excessive corporal punishment, through the Court of Appeals for the Fourth Circuit's recognition of the claim by analogy to police brutality cases, to the Court of Appeals for the Tenth Circuit's promulgation of a standard which recognizes a substantive due process claim while deleting malice as an element. The uncertainty as to whether excessive corporal punishment states a substantive due process claim and, if so, what the standards for determining that claim are, beg for resolution in the critical area of school discipline.

B. Public School Corporal Punishment Does Not Fall Within The Scope of Substantive Due Process Protection.

In granting review to resolve the conflict among the circuits,[9] this Court has the opportunity to address several issues which are vital to school officials, students and parents throughout the country. The threshold question is whether the liberty interest which this Court found to be implicated by public school corporal punishment in *Ingraham v. Wright* has a substantive content which includes excessive punishment. Petitioners submit that the Court of Appeals for the Fifth Circuit was correct in refusing to review individual instances of corporal punishment because to do so would impermissibly embroil the federal judiciary in matters of local school discipline. Petitioners further submit that the Court of Appeals for the Tenth Circuit has erroneously read this Court's decision in *Ingraham* to foreshadow a substantive due process cause of action. This Court's holding that "common-law constraints will . . . effectively remedy and deter" the anticipated "low incidence of abuse", *Ingraham, supra,* 670, 678, n.46, strongly suggests the contrary conclusion that excessive corporal punishment is not an element of the substantive content of the liberty interest. This conclusion is bolstered by the adequacy of available after-the-fact state tort remedies to redress any abuses that do occur, just as they are adequate to satisfy the procedural due process requirement specified in *Ingraham.*[10]

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[9] The fact that there are significant conflicts among the circuits which must be resolved confirms the petitioners' entitlement to qualified immunity, discussed in Point I, *supra.*

[10] Another reason to counsel this Court to hesitate before recognizing a new substantive due process right is the ability of individual school districts, state boards of education, and the state legislatures to abolish or limit corporal punishment if they perceive a lack of educational benefit or too great a risk of excessive application. Nine states have already abolished corporal punishment, seven of them since *Ingraham* was decided,

(Cont. on p. 23)

Review of this case will serve an important purpose even if this Court resolves the threshold question by concluding that excessive public school corporal punishment may give rise to a substantive due process cause of action. Review by this Court will determine which standards define the violation, thereby providing sorely needed guidance to public school officials and to the lower federal courts. Public school officials acting in good faith ought to know whether the standards governing their conduct are found in "cognate police brutality cases", *Hall v. Tawney, supra,* at 613, or in the standards of *Youngberg v. Romeo, supra,* at 322, n.29. Adoption of the standards of *Youngberg v. Romeo, supra,* would encourage some, but not complete, deference to the professional judgment of educators.[11] Adoption of the position of the Court of Appeals for the Fourth Circuit in *Hall v. Tawney,* would subject professional educators to the same level of scrutiny imposed on policemen and prison officials.

Whatever this Court determines the proper standard to be, the definition of the substantive due process cause of action enunciated by the Court of Appeals for the Tenth Circuit should be corrected. Its virtual deletion of malice as an element of the violation, coupled with the refusal of that Court of

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10 (Cont. from p. 22)
Newsweek, June 22, 1987, p. 61. The nine states are California, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont. Bills to ban corporal punishment are pending in the legislatures of Alaska, Michigan, Ohio, Washington and Wisconsin. Cities including Chicago, New Orleans, New York and San Francisco have also outlawed the practice, *id.*

11 Adoption of the position of the Court of Appeals for the Fifth Circuit in *Ingraham,* refusing to extend substantive due process protection to excessive corporal punishment would be more desirable inasmuch as it would result in complete deference to the judgment of professional educators and prevent second-guessing of educational matters by federal judges.

Appeals to acknowledge a "constitutional safe harbor" for school officials who carefully adhere to their local punishment policy, p. A-12, n.9, *infra,* subject even well-intentioned school officials to constitutional liability based purely on an after-the-fact assessment of injuries. The federal judiciary ought not be required to second-guess professional educators, nor should the substantive due process cause of action be trivialized to the level of a state law personal injury action.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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October 10, 1987

APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT – APRIL 28, 1987

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States
Court of Appeals
Tenth Circuit
APR 28 1987
Robert L. Hoecker
Clerk

TERESA GARCIA, a minor, by her next friends Max and Sandra Garcia,
Plaintiff-Appellant,
v.
THERESA MIERA, J.D. SANCHEZ, EDWARD LEYBA, JUDI MESTAS, and FELIX DURAN,
Defendants-Appellees.

No. 85-1641

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-83-0919-C)

John B. Roesler, Santa Fe, New Mexico, for Plaintiffs-Appellants.

Daniel H. Friedman of Simons, Cuddy & Friedman, Santa Fe, New Mexico, for Defendants-Appellees.

Before HOLLOWAY, Chief Judge, LOGAN, Circuit Judge, and BOHANON, District Judge.*

LOGAN, Circuit Judge.

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*The Honorable Luther L. Bohanon, Senior United States District Judge for the Western District of Oklahoma, sitting by designation.

In this appeal we review a district court's grant of summary judgment, finding that school officials involved in two incidents of corporal punishment were insulated from liability under 42 U.S.C. § 1983 by qualified immunity.

Teresa Garcia, an elementary school pupil in New Mexico, by her parents and next friends, Max and Sandra Garcia, sued the defendants in their individual capacities for denying her substantive due process in violation of 42 U.S.C. § 1983 because of two beatings[1] suffered at their hands. After considerable discovery, the defendants filed a motion for summary judgment, which the court granted. The district court concluded that the defendants were shielded from liability "by the defense of good faith immunity," R. I, 306, because the "law governing whether excess corporal punishment can give rise to a substantive due process claim is not clearly established." *Id.* at 308. Garcia has appealed the court's order, contending that at the time of the beatings excessive corporal punishment by school officials did violate her clearly established substantive due process rights.

In 1982 Garcia was a nine-year-old student in the third grade at the Penasco Elementary School in Penasco, New Mexico. On February 10, 1982, defendant-appellee Theresa Miera, the school principal, summoned Garcia to her office for hitting a boy who had kicked her. Miera instructed Garcia to go to her chair to be paddled. Garcia refused and told Miera that her

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[1] We are aware that using the word "beatings" connotes excessive force; while "paddling" may imply reasonable force. But because factual disputes may not be resolved on summary judgment, in reviewing the court's order we must construe the facts in the light most favorable to the nonmoving party. *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1411 (10th Cir. 1984). Accordingly, for the purposes of this appeal, we take Garcia's allegations to be true and we state the facts in the light most favorable to her as we have reconstructed them from the complaint, the affidavits, and excerpts from depositions presented to the district court.

father had said that "Mrs. Miera had better shape up."[2] R. I. 136.

Miera responded by calling defendant J. D. Sanchez, a teacher at the school, for assistance. Sanchez held Garcia upside down by her ankles while Miera struck Garcia with a wooden paddle. *Id.* at 105. The paddle "was split right down the middle, so it was two pieces, and when it hit, it clapped [and] grabbed." *Id.* at 165. Miera hit Garcia five times on the front of the leg between the knee and the waist. *Id.* at 277-78. After the beating, Garcia's teacher, Ruth Dominez, "noticed blood coming through [Garcia's] clothes," *id.* at 106, and, on taking Garcia to the restroom, was shocked to see a "welt" on Garcia's leg. *Id.* at 268. The beating made a two-inch cut on her leg, *id.* at 176, that left a permanent scar. *Id.* at 145. Shortly after this incident, Garcia's mother and father told Miera "not to spank Teresa again unless we were called, to make sure it was justified, and [Miera] said okay, no problems." *Id.* at 285.

The second beating at issue occurred on May 13, 1983. Miera summoned Garcia to her office for saying that defendant Judy Mestas had been seen kissing a student's father, Denny Mersereau, on a school bus during a recent field trip and that Mestas had sent love letters to Mersereau through his son.[3]

Miera proceeded to strike Garcia two times with the paddle on the buttocks. Garcia then refused to be hit again. Miera responded by calling defendant Edward Leyba, an administrative associate at the school. Leyba pushed Garcia toward

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[2] Miera cited the father's admonition to "shape up" on a school discipline record form as a reason why the corporal punishment was inflicted. R. I, 104.

[3] Mestas admits to sitting next to Mersereau on the bus, R. I, 209; and Miera testified that Mestas told her Mersereau was "her boyfriend." *Id.* at 190.

a chair over which she was to bend and receive three additional blows. Garcia and Leyba struggled and Garcia hit her back on Miera's desk, from which she suffered back pains for several weeks. R. I, 106, 150-52. Garcia then submitted to the last three blows. The beating caused severe bruises on Garcia's buttocks, which did not stop hurting for two to three weeks. *Id.* at 160. The report of the school nurse indicates that as a result of the beating Garcia's "buttocks [were] bright red with [a] crease across both." *Id.* at 109. Dr. Albrecht, a physician who treated Garcia, stated: "I've done hundreds of physicals of children who have had spankings . . . and I have not seen bruises on the buttocks as Teresita had, from routine spankings . . . [T]hey were more extensive, deeper bruises. . . ." *Id.* at 271. Betsy Martinez, a nurse who examined Garcia, stated that if a child had received this type of injury at home she "would have called [the police department's] Protective Services." *Id.* at 270. The extent and severity of Garcia's bruises is independently supported by photographs of Garcia's buttocks taken on May 13 and May 18. *Id.* at 108-a, 113. Throughout the May 13 incident, Garcia kept asking Miera to allow her to call her mother. The principal refused, saying that she knew the law. R. I, 155.

Some of these allegations were disputed by defendants in their affidavits and testimony. For purposes of reviewing the district court's grant of summary judgment to defendants, however, we must determine whether the allegations and facts recited above, if believed by the trier of fact, would establish a constitutional wrong for which plaintiff could recover.

I

We first consider whether corporal punishment of a school child, in any degree of excessiveness, can violate substantive rights under the Due Process Clause. Despite the Supreme Court's explicit disclaimer that it was deciding that issue in

Ingraham v. Wright, 430 U.S. 651 (1977),[4] we believe that *Ingraham* requires us to hold that, at some point, excessive corporal punishment violates the pupil's substantive due process rights. Rejecting the four dissenters' views that corporal punishment could violate the Eighth Amendment, the majority found the Due Process Clause applicable. The Court declared that "corporal punishment in public schools implicates a constitutionally protected liberty interest." *Id.* at 672. It recognized that among the liberty interests "'long recognized at common law as essential to the orderly pursuit of happiness by free men'" is the "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security," including "bodily restraint and punishment." *Id.* at 673-74 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). "[W]here school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that the Fourteenth Amendment liberty interests are implicated." *Id.* at 674 (footnote omitted). This language plainly indicates that the infliction of corporal punishment can affect a fundamental right susceptible to substantive due process protection. *See id.* ("It is *fundamental* that the state cannot hold and physically punish an individual except in accordance with due process of law.") (emphasis added); *see also Bowers v. Hardwick*, 54 U.S.L.W. 4919, 4921 (U.S. June 30, 1986) (noting alternative definitions of fundamental rights as "implicit in the concept of ordered liberty," or "deeply rooted in this Nation's history and tradition").

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[4] In *Ingraham* the Court declared: "We have no occasion in this case . . . to decide whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause." 430 U.S. at 679 n.47.

Although the *Ingraham* opinion focuses on procedural due process, it discusses the history of corporal punishment in the law and applies a balancing test between the child's interest in personal security and the traditional view that a school may need to be able to impose "limited" or "reasonable" corporal punishment: "[T]here can be no deprivation of *substantive* rights as long as disciplinary corporal punishment is within the limits of the common-law privilege." 430 U.S. at 676 (emphasis added). Relying upon the adequacy of state criminal and tort remedies for excessive punishment, the low incidence of abuse, and impracticality, the court held that "the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law." *Id.* at 682.

Although *Ingraham* makes clear that ordinary corporal punishment violates no substantive due process rights of school children, by acknowledging that corporal punishment implicates a fundamental liberty interest protected by the Due Process Clause, we believe that opinion clearly signaled that, at some degree of excessiveness or cruelty, the meting out such punishment violates the substantive due process rights of the pupil.

Indeed, such a view is compelling and the general principles underlying it have been recognized at least since *Rochin v. California,* 342 U.S. 165 (1952), when the Supreme Court held that the forcible use of a stomach pump by police officers violated the individual's rights under the Due Process Clause. The Court declared that official conduct that "shocks the conscience," force that is "brutal" or "offensive to human dignity," offends the Due Process Clause. *Id.* at 172-74. As Judge Friendly stated in *Johnson v. Glick,* 481 F.2d 1028 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973):

> "*Rochin* . . . must stand for the proposition that, quite apart from any 'specific' of the Bill of Rights, application of undue force by law enforce-

> ment officers deprives a suspect of liberty without due process of law. If Rochin suffered such a violation of his constitutional rights by the police as to be entitled to invalidation of a conviction obtained as a consequence, he also was the victim of a violation sufficient to sustain an action under the Civil Rights Act."

Id. at 1032 (footnote omitted).

This circuit applied that notion in the context of a school, albeit one for problem children, in *Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983). We there affirmed the issuance of a permanent injunction against the Provo Canyon School for Boys enjoining, *inter alia*, the school's use of a practice nicknamed the "hair dance." The hair dance was a form of disciplinary action whereby a school employee would "grab one of the student's arms and clutch the boy's hair with his other hand." *Id.* at 942. Our decision in *Milonas* expressly endorsed the district court's finding that the "hair dance permitted unreasonably harsh school responses to the conduct of disturbed boys." *Id.* We rejected the argument that such physical abuse was reasonably related to the legitimate objectives of the Provo Canyon School, and concluded that the defendants' actions violated the plaintiffs' due process rights. *Id.* at 940, 942.[5]

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[5] Defendants argue that *Milonas* is distinguishable because the Provo Canyon School was not a school in the "ordinary" sense; while the Provo Canyon School offered "classes on a secondary level," 691 F.2d at 935, the students at Provo Canyon were "involuntarily confined." *Id.* at 942. But we noted in *Milonas* that students were generally "admitted to the Provo Canyon School at the insistence of one or both of their parents." *Id.* at 936. In the instant case, there are elements of compulsory school attendance under New Mexico state law. N.M. Stat. Ann. § 22-12-2 (1986). The dual educational/correctional nature of the Provo Canyon School therefore is insufficient to undercut *Milonas'* precedential value.

The Fourth Circuit in *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980), a case closely analogous to the one before us, found a substantive due process right to be free of brutal, demeaning and excessive paddling by public school officials. The only appellate decision to the contrary is the Fifth Circuit decision that the Supreme Court reviewed in *Ingraham. See Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (en banc). There a majority of the en banc court found no substantive due process right and refused "to look at each individual instance of [corporal] punishment to determine if it has been administered arbitrarily or capriciously." *Id.* at 917.[6]

We here reaffirm our view, set out in *Milonas*, that at some point of excessiveness or brutality, a public school child's substantive due process rights are violated by beatings administered by government-paid school officials. We accept and agree with the Fourt Circuit's definition of the constitutional tort:

> "the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court.
>
> . . .
>
> As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted

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[6] We, like Judge Godbold in dissent, "doubt that the majority really means what it says, and . . . suspect that if in a future case the punishment inflicted has broken the victim's leg [the court] will face the issue and hold that substantive due process has been violated." *Ingraham*, 525 F.2d at 920-21 (Godbold, J., dissenting).

> to a brutal and inhumane abuse of official power literally shocking to the conscience."

Hall, 621 F.2d at 613.[7]

We believe the necessary inference from the Supreme Court's *Ingraham* decision is that excessive corporal punishment less offensive than the definition quoted above does not rise to the level of a constitutional substantive due process violation. Such lesser violations implicate only a pupil's procedural due process rights. Thus, if the state were to provide no adequate remedy to deter this lesser degree of official conduct and compensate the victim of that misconduct, we would find a violation of procedural due process.

We thus envision three categories of corporal punishment. Punishments that do not exceed the traditional common law standard of reasonableness are not actionable; punishments that exceed the common law standard without adequate state remedies violate procedural due process rights; and finally, punishments that are so grossly excessive as to be shocking to the conscience violate substantive due process rights, without regard to the adequacy of state remedies.

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[7] While this standard incorporates a subjective intent element of "malice or sadism," this element is largely redundant, because whenever "the force applied caused injury so severe, was so disproportionate to the need presented, and . . . amounted to a brutal and inhumane abuse of official power literally shocking to the conscience," we should presume that the defendant had the requisite state of mind. Such a presumption of intent also avoids difficulties in applying the objectively reasonable standard for evaluating a claim of qualified immunity established in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *See* Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 Yale L.J. 126, 127 (1986) (*Harlow* "failed to distinguish between 'malice' as an element necessary to rebut an official's qualified immunity defense and 'state of mind' as an element of the plaintiff's substantive claim.").

The district judge here found that New Mexico does provide adequate common-law remedies to afford Garcia constitutional procedural due process. Garcia has cited in supplemental authority a recent decision by another New Mexico federal judge to the effect that "New Mexico does not provide any tort remedy against public school teachers who inflict excessive punishment on their students." *McGinnes v. Cochran*, No. Civil 85-261-M, slip op. at 7 (D.N.M. June 3, 1985). But otherwise Garcia makes no procedural due process argument in this court, and we do not consider that issue.

II

Concluding that grossly excessive corporal punishment may indeed constitute a violation of substantive due process rights under the governing law, we now examine whether that law was established with sufficient clarity at the time of the beating incidents at issue here.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court significantly changed the basis for establishing the defense of qualified immunity in § 1983 actions. Under the *Harlow* test, government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The decision eliminated the subjective considerations that underlay the prior analysis enunciated by the Court in *Wood v. Strickland*, 420 U.S. 308, 322 (1975); *see also* S. Nahmod, *Civil Rights & Civil Liberties Litigation: A Guide to § 1983*, § 8.03 at 382 (1985 Supp.). Determination of qualified immunity is now to be based "on the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow*, 457 U.S. at 818.

The district court in the case before us noted the split between the Fourth and Fifth Circuits on the substantive due

process issue, and the Supreme Court's refusal to decide the question in *ingraham*, and on that basis found the law was not "clearly established." It therefore found for defendants.

The Supreme Court in *Harlow* expressly declined to address the issue of what constitutes "clearly established" law. 457 U.S. at 818 n.32.[8] In confronting the issue of what defendants should have known about the law, lower courts have had to determine the degree of "factual correspondence between the cases establishing law and the case at hand." Comment, Harlow v. Fitzgerald: *The Lower Courts Implement the New Standards for Qualified Immunity Under Section 1983.* 132 U. Pa. L. Rev. 901, 923 (1984). As the Third Circuit has noted:

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[8] The *Harlow* decision stated that "[o]n summary judgment, the judge appropriately may determine . . . the currently applicable law," as well as whether the law is clearly established. 457 U.S. at 818. This ability to determine "the currently applicable law," while not strictly necessary to decide immunity cases, is especially important under the *Harlow* test to maintain § 1983 as an important mechanism in the articulation of constitutional rights. *See, e.g., Hixon v. Durbin,* 560 F. Supp. 654, 665 (E.D. Pa. 1983) (finding that defendants' actions were unconstitutional, while granting good-faith immunity because law was not clearly established). Both the courts and commentators have worried that the clearly established test will give officials "one liability-free violation" of the Constitution, *see People of Three Mile Island v. Nuclear Regulatory Commission,* 747 F.2d 139, 145 (3d Cir. 1984); *see also* Comment, Harlow v. Fitzgerald: *The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983,* 132 U. Pa. L. Rev. 901, 926 (1984) (officials might believe they "have 'one bite' of the apple"). But if courts cannot prospectively articulate constitutional standards, there looms the even more unpalatable possibility of multiple bites of a constitutionally forbidden fruit. This is especially true in the present factual context, in which excessive corporal punishment will seldom be official school policy and in which there may be other significant barriers to maintaining an injunctive suit. *Cf. City of Los Angeles v. Lyons,* 461 U.S. 95, 105-10 (1983) (past victims of police chokeholds lack standing to seek injunction).

> "The Court in *Harlow* suggested that there must be some factual correlation, because an official may not be required 'to anticipate subsequent legal developments' nor know that 'the law forbade conduct not previously identified as unlawful.' *Harlow*, 457 U.S. at 818. Some courts have insisted that officials know and apply general legal principles in appropriate factual situations. Although officials need not 'predic[t] the future course of constitutional law,' *Pierson v. Ray*, 386 U.S. 547, 557 (1967), they are required to relate established law to analogous factual settings."

People of Three Mile Island v. Nuclear Regulatory Commission, 747 F.2d 139, 144 (3d Cir. 1984) (citations omitted). We follow the Third Circuit and adopt the second approach, "requiring some but not precise factual correspondence and demanding that officials apply general, well developed legal principles." *Id.*

Applying this standard to the instant case, we hold that, at least by the time of the second beating, the law was clearly established that excessive corporal punishment could deny substantive due process.[9] Specifically, for the reasons stated in

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[9] Even if Miera's five blows might be characterized as within the scope of the school's regulation, Penasco Board of Education Regulation § 4.18, R. I, 102 ("Corporal punishment may be administered only by the principal . . . only with a paddle . . . on the buttocks of student."), Leyba's pushing of Garcia toward the desk could still be fairly construed as a violation of the school's regulation. Moreover, "[c]onduct that is wrongful under section 1983 cannot be immunized by state law." *McClary v. O'Hare*, 786 F.2d 83, 85 (2d Cir. 1986). While reference to the regulation is relevant to determining excessiveness of punishment, it is not determinative. Unfortunately, we easily can envision scenarios in which the severity of five blows to the buttocks could be constitutionally excessive. *See, e.g., Johnson v. Commonwealth*, 111 Va. 877, 69 S.E. 1104 (1911) (beating seven-year-old girl caused bladder rupture and resulted in death). The regulation does not create a five-blow constitutional safe harbor.

Part I, we find that *Milonas* was sufficiently analogous to the facts of this case to put defendants on notice as to the law of this circuit.[10] Whether the law was clearly established at the time of the first beating is a closer question, however, because it occurred before our decision in *Milonas.*

Looking first to Supreme Court precedent, we believe that the Court's refusal in *Ingraham* to address the substantive due process claim does not, without more, mandate a conclusion that the law was not clearly established. As discussed in Part I, the concept of the substantive due process right is implicit in *Ingraham.* Indeed, before the first beating of Garcia, the author of the *Ingraham* majority, Justice Powell, describing the contours of substantive due process, had cited with approval the proposition that "corporal punishment of students may have violated due process if it 'amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'" *Parratt v. Tayor,* 451 U.S. 527, 553 N.11 (1981) (Powell, J., concurring) (quoting *Hall*, 621 F.2d at 613). Moreover, the general principles underlying *Rochin* and its progeny clearly establish that egregious deprivations of fundamental rights deny substantive due process.

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[10] The defendants' alternative claim that *Milonas* was not decided long enough before the May 13 beating to put the Penasco school officials on notice of potential violations is without merit. *Milonas* was decided September 13, 1982, and rehearing was denied November 9, 1982 – more than five months before the second beating. The defendants' assertion that the law library of the New Mexico Supreme Court received the bound volume 691 of Federal Reporter 2d in May 1983 itself implies that advance sheets were received several months earlier. The publication of advance sheets, as well as the availability of the decision much earlier by way of various legal and professional reporting services available to school officials and their legal advisors, were sufficient to give defendants notice.

We agree that a direct conflict exists between the Fourth Circuit in *Hall*, which has rejected, and the Fifth Circuit in *Ingraham*, which has upheld, the constitutionality of grossly excessive corporal punishment.[11] But the decisions of one circuit court of appeals are not binding upon another circuit. *United States v. Carson*, 793 F.2d 1141, 1147 (10th Cir. 1986). To give preclusive effect to a conflict among the circuits would effectively bind this circuit by the decisions of others. Moreover, the binding would always be in denigration of the constitutional right at issue. We hold that the conflict is relevant to the *Harlow* inquiry, but not controlling.

Despite the Fifth Circuit's position, we believe the law was clearly established before *Milonas* that some high level of force in a corporal punishment context would violate a child's substantive due process rights. We think a reasonably competent legal advisor to a school district should have realized that egregious invasions of a student's personal security would be unconstitutional. "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude." *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

III

Bare allegations of brutality in the administration of corporal punishment are insufficient to survive a motion for summary

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[11] Unfortunately *Harlow* declined to define how "'the opinions of this Court, [or] of the Courts of Appeals' . . . should be evaluated in determining what is clearly established. 457 U.S. at 818 n.32 (quoting *Procunier v. Navarette*, 434 U.S. 555, 565 (1978)). As a consequence, "lower courts are not informed whether two conflicting opinions from different district courts, or even a split decision in the court of appeals, makes the law sufficiently unclear to mandate the granting of immunity." *People of Three Mile Island*, 747 F.2d at 144.

judgment supported by affidavits as provided in Fed. R. Civ. P. 56. *See Security National Bank v. Belleville Livestock Commission*, 619 F.2d 840, 846 (10th Cir. 1979). Insubstantial or frivolous lawsuits may be dismissed without trial. *Harlow*, 457 U.S. at 818.

The threshold for recovery on the constitutional tort for excessive corporal punishment is high. But the allegations with respect to the first beating, that this nine-year-old girl was held up by her ankles and hit several times with a split board of substantial size on the front of her legs until they bled – supported by evidence of a permanent scar – are sufficient. The allegations with respect to the second beating, that the punishment was severe enough to cause pain for three weeks – supported by pictures of the injured buttocks, an affidavit from an examining doctor that in his long experience he had not seen bruises like that from routine spankings, and an affidavit from an examining nurse that if a child had received this type of injury at home she would have reported it as child abuse – are also sufficient. These claims may not survive the crucible of the trial, but they overcome defendants' motion for summary judgment.

REVERSED and REMANDED for further proceedings consistent herewith.

APPENDIX B
MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO APRIL 4, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TERESA GARCIA, et al.,
Plaintiffs,

vs.

THERESA MIERA, et al.,
Defendants.

No.
CIV-83-0919 C

FILE
United States
District Court
Santa Fe,
New Mexico
APR 4 1985
Jesse Casaus,
Clerk

MEMORANDUM OPINION

This case is before the Court on Defendants' Motion for Summary Judgment. The Court has considered carefully all of the arguments advanced by the parties, together with the supporting documentation and legal authority, and concludes that the motion should be granted.

Background.

The Plaintiff is an eleven year old girl who attended Penasco Elementary School in Penasco, New Mexico in 1982 and 1983. Defendant Theresa Miera was the Principal of Penasco Elementary School during this time. Defendants J. D. Sanchez and Judi Mestas were teachers at the school. Defendant Edward Leyba was a school administrator. Defendant Felix Duran was Superintendent of the Penasco School District.

The Plaintiff sued for damages resulting from spankings she received at school on two separate occasions. She alleges that on February 10, 1982, Defendant Miera called her to the Principal's office for disciplinary reasons. Defendant Sanchez then held the Plaintiff up in the air so that her body hung upside down while Miera paddled the Plaintiff with a wooden paddle. This paddling caused "extensive physical injury," "severe pain,"

"bleeding" and "physical and mental suffering." Amended Complaint, Paragraph 9.

The Plaintiff also alleges that on May 13, 1983, Defendant Miera again called her to the Principal's office for disciplinary purposes. This time Defendants Leyba and Mestas were present. Leyba pushed the Plaintiff to a chair, and Miera then paddled the Plaintiff with a wooden paddle. Mestas witnessed the paddling. This paddling caused "multiple bruises to [the Plaintiff's] buttocks" and other injuries similar to those alleged in connection with the February 10, 1982 incident. Amended Complaint, Paragraph 10. Defendant Dural allegedly knew of the other Defendants' propensity to use this type of punishment yet failed to take any action to prevent it. Amended Complaint, Paragraph 11.

The Plaintiff sues under 42 U.S.C. § 1983 for violation of her substantive and procedural due process rights.[1] She also alleges counts based on state torts of assault and battery and gross negligence. The Defendants seek summary judgment on the constitutional claims and dismissal of the pendent state claims. The Court will grant the Defendants' motion for the reasons stated below.

Substantive Due Process

The Plaintiff argues that excessive corporal punishment of a student in a public school gives rise to a substantive due process claim. The Defendants urge either that they are entitled to a good faith immunity defense because the law on this issue is not settled, or that the facts of this case do not support a substantive due process claim. The Court concludes that the

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[1] The Plaintiff apparently has abandoned her claim based on 42 U.S.C. §1985(2). *See* Defendants' Memorandum of Law in Support of their Motion for Summary Judgment at 1, n.*.

Defendants are shielded from liability on this claim by the defense of good faith immunity.

The Supreme Court's opinion in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), laid the foundation for determining the scope of official immunity.[2] In *Harlow* the Court eliminated the subjective aspect of the good faith immunity test, and adopted instead an objective inquiry. Under this analysis, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The Court laid out the nature of the inquiry:

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[2] Although the Court in *Harlow* addressed only the immunity available to "senior aides and advisors of the President of the United States" in damage suits, 457 U.S. at 802, the Court did point out that "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Id.* at 818, n.30 (citation omitted). The Circuit Courts have applied the *Harlow* immunity test to a variety of government official defendants. *See, e.g., Rex v. Teeples*, ___F.2d___ (10th Cir. Jan. 23, 1985) (prosecutor); *Coleman v. Turpen*, 697 F.2d 1341 (10th Cir. 1982) (prosecutor and county sheriff); *Trejo v. Perez*, 693 F.2d 482 (5th Cir. 1982) (police officer); *Hall v. United States*, 704 F.2d 246 (6th Cir. 1983) (officials of the Internal Revenue Service); *Fujiwara v. Clark*, 703 F.2d 357 (9th Cir. 1983) (officer of the Department of Education of the State of Hawaii). The Plaintiff's argument that the *Harlow* test applies only to the facts in *Harlow* itself is not supported by the case law.

The Court also is not persuaded by the argument that the Defendants have waived their immunity defense by raising it after extensive discovery has taken place. While the Court in *Harlow* indicated a preference for resolving the immunity issue at a threshold level, this defense is a bar to actual liability. Furthermore, on December 11, 1984, the Court permitted the Defendants to amend their answer to include the immunity defense, even though the discovery process had already begun.

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id. (footnote omitted). The Court will apply this analysis to the law governing the substantive due process claim.

The Defendants argue that the law is not clearly established on whether excessive corporal punishment in schools can give rise to a substantive due process claim. In *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (*en banc*), *aff'd on other grounds*, 430 U.S. 651 (1977), the Fifth Circuit refused to recognize such a claim. Although the Plaintiff argues that the Fifth Circuit rejected only a substantive due process challenge to corporal punishment *per se*, and not a claim based on the application of corporal punishment in a particular case, the Court in *Ingraham* did state specifically that:

> [W]e refused to look at each individual instance of punishment to determine if it has been administered arbitrarily or capriciously. We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks.

Id. at 917. The dissenting judges focused on the "circumstances and severity of the beatings," *id.* at 925, and found a "denial of substantive due process of law." *Id.* at 926.

The Fourth Circuit has rejected the Fifth Circuit's decision in *Ingraham*, which it characterized as holding that "federal

constitutional right[s] could not be made to turn upon relative levels of severity of specific, perhaps unauthorized, incidents of corporal punishment." *Hall v. Tawney,* 621 F.2d 607, 612 (4th Cir. 1980). The Fourth Circuit instead adopted the view of the dissenting judges in *Ingraham* and recognized that a cause of action based on substantive due process could exist in the context of school corporal punishment. The Court in *Hall v. Tawney* described the applicable standard as follows:

> [T]he substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

Id. at 613.

These two diverse Circuit Court opinions indicate that the law governing whether excessive corporal punishment can give rise to a substantive due process claim is not clearly established. The Fourth Circuit answers yes; the Fifth Circuit answers no. The Tenth Circuit has not addressed this question. The Supreme Court reviewed the Fifth Circuit case in *Ingraham v. Wright,* 430 U.S. 651 (1977), but expressly declined review of the substantive due process issue. *Id.* at 659 n.12. The Fifth Circuit itself recently noted the difference between it and the Fourth Circuit on this issue, and stated that its case did "not require reevaluation of our refusal in *Ingraham* to examine particular episodes for conformity with substantive due process." *Woodard v. Los Fresnos Independent School District,* 732 F.2d 1246 (5th Cir. 1984).

The Court concludes that the law on this substantive due process issue was not clearly established at the time the Plaintiff

was paddled in the Penasco Elementary School.[3] Accordingly, under the immunity standard of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), all the Defendants are entitled to summary judgment on the Plaintiff's substantive due process claim.[4]

Procedural Due Process

The starting point for analysis of a procedural due process claim in the context of school discipline is the Supreme Court's decision in *Ingraham v. Wright*, 430 U.S. 651 (1977). The Court in *Ingraham* expressly stated that "corporal punishment in public schools implicates a constitutionally protected liberty interest, but we hold that the traditional common-law remedies are fully adequate to afford due process." *Id.* at 672. The remedies on which the Court relied were the state of Florida's tort and criminal provisions. The Defendants here argue that New Mexico also has adequate common-law remedies to redress this alleged violation. Alternatively, the Defendants argue that they are entitled to a good faith immunity defense on this claim, and that the facts of this case do not rise to a procedural due process violation. The Court agrees with the Defendants' arguments.

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[3] Indeed, earlier in this case the Court certified for interlocutory appeal the issue of the viability of Plaintiff's substantive due process claim, citing "substantial ground for difference of opinion." Order of Sept. 5, 1984. The Tenth Circuit declined to accept the interlocutory appeal.

[4] The Plaintiff argues that her allegations of malice should defeat the good faith immunity defense, citing *Harlow*, 457 U.S. at 817. This argument is unpersuasive for two reasons. First, malice would be an essential element of the substantive due process claim, as defined by *Hall v. Tawney*, 621 F.2d at 613. Under the Plaintiff's reasoning, the immunity defense could never apply to this type of claim. Second, and perhaps more importantly, the Supreme Court in *Harlow* expressly rejected the subjective element of the good faith immunity defense, due to the "substantive costs" of the subjective inquiry. 457 U.S. at 816-17. The defense now is based on the "objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Id.* at 818.

The Supreme Court in *Ingraham* concluded that given Florida's common-law safeguards against abuse, "the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools." 430 U.S. at 682. Instead, the Court ruled that "the Fourteenth Amendment's requirement of procedural due process is satisfied by Florida's preservation of common-law constraints and remedies." *Id.* at 683. In Florida, school authorities who inflicted excessive punishment could be held liable in damages and, if they acted with malice, subjected to criminal penalties. *Id.* at 677. These post-deprivation remedies provide restraint on school authorities who might otherwise exceed their common-law privilege to use reasonable corporal punishment. *See id.* at 674. As the Court stated:

> In those cases where severe punishment is contemplated, the available civil and criminal sanctions for abuse – considered in light of the openness of the school environment – afford significant protection against unjustified corporal punishment . . . . Teachers and school authorities are unlikely to inflict corporal punishment unnecessarily or excessively when a possible consequence of doing so is the institution of civil or criminal proceedings against them.

Id. at 678.

In this case, the Plaintiff and the Defendants differ sharply over whether New Mexico has post-deprivation remedies which are adequate to redress a violation of a student's liberty interest. The Defendants cite to this Court's opinion in *Willcox v. Salazar*, No. 81-1051-C (D.N.M. Mar. 11, 1982) for the proposition that New Mexico does have adequate post-deprivation remedies. In *Willcox* the plaintiff alleged a procedural due process violation arising from a school paddling. The court granted the Defendants summary judgment on this count for the following reasons:

> New Mexico has, just as Florida did in *Ingraham*, common law tort remedies and criminal penalties covering situations where school children may be abused by school personnel. Apart from the tort actions for negligence, assault and battery, New Mexico criminal statutes §§ 30-3-1, 30-3-4, 30-3-5, and 30-6-1, N.M.S.A. 1978 set forth criminal sanctions for the physical abuse of children. Additionally, the New Mexico courts have held that failure to judiciously administer corporal punishment can be the grounds for a teacher's termination as it constitutes an unsatisfactory work performance under the teacher's employment contract. *Morgan v. New Mexico State Board of Education*, 83 N.M. 106 (Ct. App. 1971). Since New Mexico has sufficient common law and criminal law remedies to control excessive corporal punishment of public school students by teachers, I conclude, based on the holding in *Ingraham*, that these traditional common law remedies are fully adequate to afford due process. *Ingraham v. Wright, supra*, at 672.

Id., slip op. at 3-4.

Nonetheless, an argument could be made that the New Mexico Tort Claims Act bars a state tort remedy by cloaking school officials with sovereign immunity. In *Garcia v. Albuquerque Public Schools Board*, 95 N.M. 391 (Ct. App. 1980), a student who was struck by his public school teacher sued the school board and the teacher. The district court dismissed the complaint because the defendants had immunity under the Tort Claims Act. The Court of Appeals affirmed. It would appear, therefore, that New Mexico may not provide a tort remedy against excessive corporal punishment.

This Court did not consider the *Garcia* case when it decided *Willcox*. *Garcia* was not cited to the Court by the parties in *Willcox*, and upon reflection the Court is not convinced that

Garcia would bar a student's tort remedy. The sole basis for the plaintiffs' appeal in *Garcia* was that the Tort Claims Act was unconstitutional. The three-judge panel disagreed in its affirmance of the district court's dismissal. Judge Lopez authored the opinion finding the Act constitutional. Judge Sutin concurred specially, agreeing that the Act is constitutional but pointing out that the plaintiffs had stated a claim under the Act. The Act grants immunity, unless expressly waived, for any tort liability incurred while a public employee is acting "within the scope of duty." N.M.Stat.Ann. § 41-4-4(A) (1982 Repl. Pamp.). "Scope of duties" means "performing any duties which a public employee is requested, required or authorized to perform." N.M. Stat.Ann. § 41-4-3(F) (1984 Cum.Supp.). According to Judge Sutin, the defendant teacher was not acting within the scope of his duties when he allegedly maliciously, willfully or negligently hit the plaintiff. The third judge on the *Garcia* panel, Judge (now Justice) Walters dissented, finding the Tort Claims Act unconstitutional.

The *Garcia* case obviously does not provide a clear precedent for the conclusion that students have no tort remedy against public school teachers who inflict excessive corporal punishment. Two of the judges in *Garcia* would have provided the plaintiff a remedy, finding the teacher to be without sovereign immunity either because he acted outside of the scope of his duties, or because the Tort Claims Act was unconstitutional. Based on this Court's prior decision in *Willcox,* and on the certainty of the Court of Appeals' decision in *Garcia,* the Court concludes that New Mexico does provide adequate common-law remedies to afford the Plaintiff procedural due process. Furthermore, even if the Tort Claims Act does bar the Plaintiff's tort remedy, the state's criminal sanctions for the physical abuse of children may in themselves provide adequate procedural due process protection. *See Ingraham v. Wright,* 430 U.S. 651, 678 (1977) (deterrence based on civil *or* criminal proceedings).

Even if New Mexico's common-law remedies are not adequate under the Supreme Court's analysis in *Ingraham v. Wright*, the Court also concludes that the Defendants are entitled to the good faith immunity defense on this claim. The law on this issue was not clearly established at the time the Plaintiff was paddled. On its face, *Garcia* seems to indicate that New Mexico would not provide adequate post-deprivation remedies for a procedural due process violation. Yet, this Court in *Willcox* held that New Mexico's remedies were adequate. The Defendants in this case could not reasonably have known that New Mexico's remedies were inadequate and that they had to provide pre-punishment procedural due process. Accordingly, the Defendants are shielded from liability on this claim based on good faith immunity.

Finally, even if New Mexico's post-deprivation remedies were inadequate, and even if the Defendants were not entitled to the good faith immunity defense, the Court concludes that the facts of this case do not rise to a procedural due process violation. Defendant Miera, the school Principal, afforded the Plaintiff sufficient due process before making the decision to paddle the Plaintiff. Based on the uncontroverted facts, the Plaintiff has failed to make out a procedural due process claim.

Defendant Miera has offered evidence that she conducted an investigation and interviewed the Plaintiff and other children before each separate paddling. The Plaintiff disputes this only by indicating that Defendant Miera did not question all of the children involved in the February 1982 incident, and that Defendant Miera wrongfully concluded that the Plaintiff committed a more grievous infraction than the other children in the May 1983 incident and so would be the only one spanked. The Plaintiff does not deny that she committed some infraction prior to each spanking, and that she had the opportunity to tell Defendant Miera everything she wanted to before the spankings.

The Court concludes that Defendant Miera's investigation, together with the Plaintiff's opportunity to be heard prior to the spankings, constitute sufficient procedural due process in the context of this case. As the Supreme Court in *Ingraham v. Wright,* 430 U.S. 651 (1977), pointed out in not requiring a hearing prior to corporal punishment, "[t]he purpose of corporal punishment is to correct a child's behavior without interrupting his education." *Id.* at 674 n.43. Prior procedural safeguards would not only impair a teacher's ability to maintain classroom discipline, *id.* at 681 n.50, but may also "make the punishment more severe by increasing the anxiety of the child." *Id.* at 681 n.51.

Defendant Miera's investigation and interviews of the children involved provided due process consistent with the purposes of effective school discipline. Her procedures constituted "an informal give-and-take between student and disciplinarian" in which the student had "an opportunity to explain [her] version of the facts." These are the "minimal procedures" which the dissent in *Ingraham* preferred over the majority's reliance on post-deprivation remedies. 430 U.S. at 693, 700 n.18. *See Goss v. Lopez,* 419 U.S. 565 (1975). Furthermore, there does exist some evidentiary basis for Defendant Miera's conclusions and, absent conduct which gives rise to a constitutional violation, "§ 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings." *Atencio v. Bd. of Ed. of Penasco Ind. Sch. Dist.,* 658 F.2d 774, 780 (10th Cir. 1981), *quoting Wood v. Strickland,* 420 U.S. 308, 326 (1975).

As a final point, the Plaintiff appears to argue that Defendants Miera and Duran agreed after the February 1982 spanking that the Plaintiff would not be spanked again unless her parents were notified in advance. First, the deposition testimony does not support the Plaintiff's assertion that these Defendants "promised" to call her parents before the next spanking.

Second, this alleged fact does not in itself give rise to a procedural due process violation. The Supreme Court in *Ingraham* clearly stated that "parental approval of corporal punishment is not constitutionally required." 430 U.S. at 662 n.22. Under Section III.B.3 of State Board of Education Regulation No. 81-3, local school boards may decide whether to use corporal punishment. The Regulation provides that "[a] school board policy authorizing corporal punishment will override any parent's objection to its use unless the local school board also authorizes individual parents to veto corporal punishment of their children." Regulation 4.18 of the Board of Education of the Penasco School District authorizes use of corporal punishment in the Penasco schools and makes no mention of parental approval or veto. The Defendants, therefore, did not violate constitutional or state law in not notifying the Plaintiff's parents in advance of her corporal punishment.

The Court concludes that all the Defendants are entitled to summary judgment on the Plaintiff's procedural due process claim.

State Torts

Since the Court has granted the Defendants summary judgment on all the Plaintiff's constitutional claims, the Court will exercise its discretion and dismiss the pendent state tort claims. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966).

The Court will enter an order in conformity with this Opinion.

/s/ Santiago E. Campos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
United States
District Court
Santa Fe, New Mexico
APR 4 1985
Jesse Casaus, Clerk

TERESA GARCIA, et al.,
Plaintiffs,

vs.

No. CIV-83-0919 C

THERESA MIERA, et al.,
Defendants.

Entered on Docket
4 - 4 - 85

ORDER

IN ACCORDANCE with the views expressed in the accompanying Memorandum Opinion,

IT IS ORDERED that Defendants should be, and hereby are, granted summary judgment on Count I of the Plaintiffs' Amended Complaint.

IT IS FURTHER ORDERED that all counts in the Plaintiffs' Amended Complaint should be, and hereby are, dismissed.

/s/ Santiago E. Campos
UNITED STATES DISTRICT JUDGE

APPENDIX C
ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING AND CONSIDERATION *EN BANC* JULY 16, 1987

JULY TERM – July 16, 1987

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Circuit Judges, and Honorable Luther Bohanon, District Judge*

TERESA GARCIA, a minor, by her next friends Max and Sandra Garcia, *Plaintiff-Appellant,*	)	
v.	)	No. 85-1641
THERESA MIERA; J.D. SANCHEZ; EDWARD LEYBA; JUDI MESTAS and FELIX DURAN, *Defendants-Appellees.*	)	

The court has for consideration appellees' petition for rehearing, with suggestion for rehearing *en banc*, and appellant's response thereto with request for $250 levy against the appellees for time-wasting delay.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no

*Senior United States District Judge for the Western District of Oklahoma, sitting by designation.

member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing *en banc*, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing is denied.

It is further ordered that appellant's request for a $250 levy against appellees is denied.

/s/ Robert L. Hoecker

ROBERT L. HOECKER, Clerk

Supreme Court, U.S.
FILED
JAN 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-603

IN THE

Supreme Court of the United States

October Term, 1987

THERESA MIERA, J. D. SANCHEZ, EDWARD LEYBA, JUDI MESTAS and FELIX DURAN,
Petitioners,

v.

TERESA GARCIA, a minor, by her next friends Max and Sandra Garcia,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January 14, 1988

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No. 87-603

IN THE

Supreme Court of the United States

October Term, 1987

THERESA MIERA, J. D. SANCHEZ, EDWARD LEYBA, JUDI MESTAS and FELIX DURAN,
Petitioners,

v.

TERESA GARCIA, a minor, by her next friends Max and Sandra Garcia,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JURISDICTION

There is no contest as to Petitioners' right to file their Petition for Writ of Certiorari; however, there are insufficient reasons for this Court to exercise its discretion of issuing Writ of Certiorari in this case.

STATEMENT OF THE CASE

Respondent adopts by reference Petitioners' Statement of the Case, except as to improper attempt to argue and portray the facts differently than in the Tenth Circuit's Opinion in this case. *See* pages 6, 7, footnote 2 of the Petition herein.

Furthermore, at page 4 of the Petition, the statement, "filed suit under 42 U.S.C. § 1983 . . . claiming violation of her . . . substantive due process rights" should be amplified as per the Tenth Circuit's opinion (A-2; all appendix references are to Petitioners' Appendix to Petition for Writ of Certiorari) to read, "filed suit for denying her substantive due process in violation of 42 U.S.C. § 1983 because of two beatings, excessive force, suffered at the hands of defendants, public school teachers."

SUMMARY OF ARGUMENT

This Court should not issue Writ of Certiorari because there is no true conflict of appellate court decisions, nor any conflict between the Tenth Circuit's opinion in this case and any opinion rendered by this United States Supreme Court, nor has the Tenth Circuit departed from the accepted and usual course of judicial proceedings so as to call for an exercise of power of supervision.

This Court decided in *Ingraham v. Wright, infra,* that excessive corporal punishment in a public school implicates the substantive due process right. Furthermore, the Fifth Circuit's decision in *Ingraham*, as pertains to substantive due process, is premised upon the availability of after-the-fact state tort remedies, of which there are *none* in the State of New Mexico.

The Tenth Circuit did not depart from *Hall v. Tawney, infra,* rather, it specifically adopted the *Tawney* standard in the body of its opinion.

Anderson v. Creighton, infra, is distinguishable from the case at bar. The *Anderson* Court of Appeals used only general language to describe the right alleged to have been violated without any more discussion *and* refused to even entertain

the *Harlow v. Fitzgerald, infra,* argument, which was the basis of reversal.

ARGUMENT AND AUTHORITIES

There is no question that "corporal punishment in public schools implicates a constitutionally protected liberty interest." *Ingraham v. Wright,* 430 U.S. 651, 672 (1977). This Court had clearly spoken on the issue, prior to the beatings in the present case, and modified the effect of the Fifth Circuit's decision in *Ingraham v. Wright,* 525 F.2d 909 (5th Cir. 1976), thus allowing for a substantive due process claim in a proper case, even in the Fifth Circuit. Therefore, there is, upon closer examination, no real conflict with the Fourth Circuit's decision in *Hall v. Tawney,* 621 F.2d 607 (4th Cir. 1980).

Also, the Fifth Circuit's discussion of the substantive due process right in *Ingraham,* 525 F.2d at p. 917, was merely dicta, vis a vis the holding that corporal punishment *per se* does not violate the liberty interest. Even as to this discussion of abuse in particular instances, the court's conclusion was premised upon the existence of a state remedy. *Id.*

The existence of other remedies properly belongs to the procedural due process issue. Nevertheless, insofar as the Fifth Circuit and the Petitioners in this case discuss the two issues of substantive due process and procedural due process together, it should be noted that "New Mexico does not provide any tort remedy against public school teachers who inflict excessive punishment on their students." *McGinnes v. Cochran,* No. Civil 185-261-M, slip op. at 7 (D.N.M. June 3, 1985). *See also Pemberton v. Cordova,* 105 N.M. 47, 734 P.2d 254 (Ct. App. 1987), and the New Mexico State Tort Claims Act, Sections 41-4-1 through 41-4-27, 1978 N.M.S.A., as amended. Therefore, even in considering the issue of other remedies in the context of substantive due process, Respondent has an

even stronger argument that the Tenth Circuit is safe from any potential conflict with *Ingraham*, and in fact presents quite a different case where there is no state remedy.

Criminal proceedings do not provide a "remedy" here for the injured "party," who is not even a party to the criminal action. Again, the availability or unavailability of other relief pertains to procedural due process, which is not an issue in this case. However, if it is considered here in conjunction with the substantive due process right, it must be remembered that prosecution of a criminal case is completely subject to the whim of prosecutorial discretion, and there are no damages for the injured non-party. Restitution in criminal cases depends on the jurisdiction, may be incomplete, and problematic insofar as insurance coverage in states such as New Mexico where insurance is tied to the Tort Claims Act. *See* Section 41-4-20, 1978 N.M.S.A., as amended.

It is also argued that the Tenth Circuit has now created a conflict and variance with the *Tawney, supra*, Section 1983 threshhold standard, "collaps[ing] the element of malice." *See* Petition herein, at p. 20. This is simply incorrect. The Tenth Circuit specifically "accept[ed] and agree[d] with the Fourth Circuit's definition of the constitutional tort . . . ." (A-8, A-9). It is only by way of footnote that the Tenth Circuit suggests the obvious, as it relates to matters of proof, not the standard itself, that "[w]hile this standard incorporates a subjective intent element of 'malice or sadism' . . . we should presume . . . the requisite state of mind . . . whenever 'the force . . . amounted to a brutal and inhuman abuse of official power' . . . ." *Id.*, at fn. 7.

The argument that Federal courts, indeed *any* court in the State of New Mexico, cannot hear a complaint involving brutality of students at the hands of public educators stretches the imagination and our system of justice beyond the outer

limits, to say nothing of the equal protection of our youth in this country.

Lastly, *Anderson v. Creighton*, 483 U.S. ___, 97 L.Ed.2d 523 (1987), is different from the case at bar, and is thus not controlling here. The grounds for reversal in *Anderson* do not exist in the present case. The *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), "objective legal resasonableness" to be assessed in light of the legal rules that were "clearly established" at the time of the alleged unlawful action depends substantially upon the level of generality at which the legal rule is to be identified. *Anderson, supra*, at p. 530.

In *Anderson*,

> "[t]he Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that a general right Anderson was alleged to have violated – the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances – was clearly established. *The Court of Appeals specifically refused to consider the argument that it was not clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances. [T]his refusal was erroneous.*" (Emphasis supplied.)

Anderson, supra, at p. 531.

The Tenth Circuit in the present case did address, with fact-specific reference and anology, the clearly established legal principle vis a vis the *Harlow* defense as required by *Anderson*. *See, Garcia By Garcia v. Miera*, 817 F.2d 650, 656-658 (10th Cir. 1987) (Section II of the opinion).

CONCLUSION

For the reasons aforestated, the Petition for Certiorari should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The petitioners Theresa Miera, J. D. Sanchez, Edward Leyba, Judi Mestas and Felix Duran respectfully submit the following reply brief in support of their petition for a writ of certiorari.

Respondent offers no plausible grounds for opposition to the petition. Respondent's primary arguments are, first, that

there is actually no conflict between the Courts of Appeals for the Fourth and Fifth Circuits concerning the existence of a substantive due process cause of action and, second, that this Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), has already recognized the cause of action, Response, p. 3. The obvious flaws in these assertions are that the Court of Appeals for the Tenth Circuit itself acknowledged a "direct conflict" between the other circuits, Petition, p. A-14, and this Court in *Ingraham* explicitly disclaimed any determination on the substantive due process cause of action, *id.*, at 679, n.47.

Contrary to Respondent's assertion, the conflict between the two circuits, now further complicated by the Court of Appeals for the Tenth Circuit's divergent interpretation of the elements of the claim, Petition, pp. 20-21, both justifies the grant of a writ of certiorari and the petitioners' entitlement to qualified immunity on the basis of unsettled law.

Respondent spends considerable time attempting to demonstrate, incorrectly, that New Mexico provides no post-deprivation remedies for excessive corporal punishment,[1] while simultaneously arguing that their availability or non-availability is irrelevant to whether excessive corporal punishment implicates a substantive due process cause of action, Response, pp. 3-4.

---

1. The district court's determination that New Mexico provides after-the-fact tort and criminal remedies, Petition, p. B-9, was not challenged on appeal, Petition, p. A-10. Furthermore, legislation enacted subsequent to the commencement of this case clarified that only school officials who administer punishment in good faith are immune from damages, a formulation which is in complete harmony with a substantive due process standard, *see*, § 22-5-4.3D, N.M.S.A. 1978 (1986 Repl.).

To the contrary, *Ingraham*'s observation that "common-law constraints will . . . effectively remedy and deter" the anticipated "low incidence of abuse", *id.*, 670, 678, n.46, suggests a rationale for precluding excessive punishment as a substantive element of the liberty interest. Far from militating against the grant of a writ of certiorari, a definitive determination of this critical question and related questions of equal magnitude is sorely needed by school officials, students and parents throughout the country.

Finally, Respondent argues that the principles of *Anderson v. Creighton*, 483 U.S.___, 97 L.Ed.2d 523 (1987) are not controlling because, in ways not specified by Respondent, the Court of Appeals for the Tenth Circuit "did address, with fact-specific reference and anology [sic], *the clearly established legal principle* . . .", Response, p. 5 (emphasis added). The italicized language echoes the Court of Appeals for the Tenth Circuit's conclusion that officials who fail to apply "general, well developed legal principles", Petition, p. A-12, must be denied qualified immunity. However, analysis of legal principles at this level of abstraction is precisely the practice rejected in *Anderson v. Creighton*, 97 L.Ed.2d, at 530-531.

Denial of qualified immunity in the face of a "direct conflict" between two appellate circuits, Petition, p. A-14, coupled with an expectation that school officials divine the contrary "implicit" intent behind an "explicit disclaimer" in *Ingraham*, *supra*, Petition, pp. A-4, A-13, broadly departs from the teachings of this Court and conflicts with the holdings of other courts of appeals. This Court has not hesitated to summarily remand qualified immunity decisions for reconsideration in light of *Anderson v. Creighton*, *see*, *Pickett v. Chapman*, 801 F.2d 912 (7th Cir. 1987), *cert. granted and vacated*,

56 U.S.L.W. 3241 (U.S. Oct. 5, 1987) (No. 87-28), *see,* Petition, p. 12, n.3. Certiorari should be granted in the present case.[2]

Respectfully submitted,

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January 19, 1988

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2. Respondent suggests that petitioners have "improper[ly]" portrayed the facts at Petition, p. 6, n.2, *see,* Response, p. 1. Petitioners stand by their assertion that, even under the Respondent's version of the facts, the medical treatment required for her alleged injuries was minimal.

(3)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

Both parties have consented to the filing of this brief. The consent is on

file with the clerk.

QUESTIONS PRESENTED

1. Whether the law is "clearly established" so as to prevent the grant of qualified immunity to public school officials, where two courts of appeals are in direct conflict?

2. Whether the openness of the public schools and the availability of state law remedies preclude federal judicial scrutiny of individual incidents of allegedly excessive public school corporal punishment under a substantive due process standard?

INTEREST OF AMICUS CURIAE

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's forty-nine state school boards associations, the Hawaii State Board of Education, the District of Columbia school board and the

Virgin Islands. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, and educational and discipline standards of the public schools.

The subject of school discipline is of vital concern to school boards across the country. Although not all school boards are authorized under state law to use corporal punishment as a disciplinary tool, all school boards are concerned that

decisions such as that of the Court of Appeals for the Tenth Circuit will seriously undermine their ability to enforce school rules and impose disciplinary sanctions in a reasonable manner, taking into account local exigencies.

STATEMENT OF THE CASE

Amicus incorporates by reference thereto the statement of the case contained in brief of Petitioners.

REASONS FOR GRANTING THE WRIT

I. THE LAW IS NOT "CLEARLY ESTABLISHED" SO AS TO PREVENT THE GRANT OF QUALIFIED IMMUNITY TO PUBLIC SCHOOL OFFICIALS, WHERE TWO COURTS OF APPEALS ARE IN DIRECT CONFLICT.

Coming only three weeks after this Court's comprehensive decision in Anderson v. Creighton, 107 S.Ct. 3034 (1987), the decision of the Court of Appeals for the Tenth Circuit denying qualified immunity

to the Penasco School District officials and teachers seems a particularly puzzling rejection of this vital doctrine.

School officials and teachers are daily called on to make numerous split-second decisions in murky areas of law concerning the welfare of students and the maintenance of discipline. To hold them accountable, as the Tenth Circuit has done, where a direct conflict exists among the appellate circuits cannot but have a chilling effect on their willingness to act with dispatch in critical educational decisions. They need the protection of this defense as much as did the police officials in Malley v. Briggs, 106 S.Ct. 1092 and the Federal Bureau of Investigation agent in Anderson v. Creighton, supra.

As Petitioners observe (Petition, 12, n. 3), it is not at all clear whether the

Court of Appeals for the Tenth Circuit actually considered the impact of Anderson v. Creighton.

II. THE OPENNESS OF THE PUBLIC SCHOOLS AND THE AVAILABILITY OF STATE LAW REMEDIES PRECLUDE FEDERAL JUDICIAL SCRUTINY OF INDIVIDUAL INCIDENTS OF ALLEGEDLY EXCESSIVE PUBLIC SCHOOL CORPORAL PUNISHMENT UNDER A SUBSTANTIVE DUE PROCESS STANDARD.

A. In a civil setting, this Court has applied substantive due process only in cases involving challenges to statutes or policies.

Traditionally this Court has been temperate in its use of "substantive due process" to overturn a state policy. In each case, the Court has found an overriding federal interest in protecting a "right" which the state has chosen through written policy to trammel. In each case, the state has made a conscious choice, incorporated in a statute or a local policy, which in some way restricts that "right."

Under the rubric of "substantive due process," the Court has overturned statutes interfering with the right of privacy (use of contraceptives), Griswold v. Connecticut, 381 U.S. 479 (1965); the right to educate one's children in the school of one's choosing, Pierce v. Society of Sisters, 268 U.S. 510 (1925); the right to study a foreign language, Meyer v. Nebraska, 262 U.S. 390 (1923); the right to travel, Aptheker v. Secretary of State, 378 U.S. 497 (1954). In all of these cases the Court had before it a state or federal statute which on its face abridged the free exercise of a "fundamental right."

Where actions to implement a policy are challenged, this Court has not been eager to find substantive due process implications. In Wood v. Strickland, 420 U.S. 315 (1975), the court of appeals

found a substantive due process violation in a school board's alleged misinterpretation of its rule against the possession of alcoholic beverages on school grounds. This Court vacated the judgment, holding "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." Id. at 326.

In 1982, in a per curiam opinion, this Court reversed another attempt by the same court of appeals, through the use of substantive due process, to substitute its own policy judgment for that of the school board. Board of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982).

In a concurring opinion in Regents of University of Michigan v. Ewing, 106 S.Ct. 507 (1985), Justice Powell stated that it was unnecessary for the Court to assume

the existence of a substantive due process right to be free from arbitrary dismissal from a medical program.

> "While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution... substantive due process rights are created only by the Constitution...The history of substantive due process 'counsels caution and restraint.' Moore v. City of East Cleveland, 431 U.S. 494 (1977)...Each new claim to [substantive due process] protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed.' [Citing Poe v. Ullman, 367 U.S. 497 (1961]." Id. at 515.

The case at bar differs from the traditional civil substantive due process case which challenges a statute or policy as unconstitutional. Here, there is no allegation that either a state statute or a local school board policy authorizes the use of "excessive" or "unreasonable"

physical force in punishing students. (Not only is excessive punishment not authorized by statute, it is prohibited.) Respondents take issue with action of the Petitioners - not the policy - a circumstance where the application of substantive due process is at best questionable.

B. The decision below fails to take into account state tort remedies.

This Court in Ingraham v. Wright, 430 U.S. 651 (1977), held that the Eighth Amendment's proscription against cruel and unusual punishment does not apply to school corporal punishment. As to the issue of procedural due process the Court held that, although "corporal punishment in public schools implicates a constitutionally protected liberty interest...the traditional common-law remedies are fully adequate to afford due

process."

The Petitioners in Ingraham also raised the question of substantive due process: "Is the infliction of severe corporal punishment upon public school students arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment?" The Court expressly refused to address that question. 430 U.S. at 658 n.12, 679 n.47.

This Court's decision not to address this issue left standing a determination by the Court of Appeals for the Fifth Circuit that excessive corporal punishment at any level did not implicate a substantive due process cause of action. Subsequently, the Fourth Circuit in Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980), and now the Tenth Circuit have disagreed.

This conflict among three circuits begs for resolution.

If is difficult to understand how both procedural and substantive due process can be implicated in a case alleging excessive corporal punishment. Under Ingraham, a plaintiff may be afforded procedural due process only through resort to state tort remedies, after the corporal punishment has been imposed. Could the plaintiff, after obtaining a judgment in state court, then seek damages in federal court for the denial of substantive due process rights?

In 1986 the Court ruled in Daniels v. Williams, 106 S.Ct. 662 (1986), that the "Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property," even in the context of a prison where the

openness of the public schools is not present.

One may attempt to distinguish Daniels from this case on the basis that corporal punishment is an intentional act. But, Respondents do not complain of the imposition of corporal punishment per se. Their complaint is based on the imposition of excessive corporal punishment. That excess, if any, arises out of an act of negligence. It would seem that the rule of law in Daniels should apply here as well.

C. Substantive due process in the context of the public schools should be treated differently than in the criminal context.

Amicus submits that substantive due process standards should not be transplanted by the courts from the criminal enforcement context into the classroom as both the Fourth and Tenth

Circuits have done. As this Court noted in Ingraham v. Wright, supra at 670:

> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

Prisoners are not in the position to file criminal assault charges because the complaints would have to be filed with the very officials who have committed the offense. In those cases there is no reasonable way to obtain "due process" from the state and the injured party must resort to the federal courts.

The court of appeals below cites Rochin v. California, 342 U.S. 1645 (1952), for the proposition that substantive due process applies in any case where the actions of a public official "shock the conscience." Unlike a prisoner, however, students and their

parents have access to the criminal justice system to assure that public school officials do not abuse their disciplinary powers to the extent of "shocking the conscience."

It is difficult to understand why a state's tort laws are sufficient to afford procedural due process even though instituted after a constitutionally protected "liberty" interest is infringed, Wood v. Strickland, supra, - but are insufficient to remedy an infringement of a "fundamental right" for the purpose of affording substantive due process. These legal bright lines lead public officials to cease disciplinary actions altogether rather than face a federal lawsuit. Perhaps that is the end some federal courts are seeking, but one wonders if that is an appropriate end.

D. The lower court's interpretation of substantive due process expands jurisdiction of the federal courts over any decision that could raise a "liberty" interest for purpose of procedural due process.

The court of appeals reasons in its decision below that where a liberty interest exists to support a procedural due process claim, that automatically raises a substantive due process claim as well. Although the case at bar relates only to corporal punishment, the court of appeals' theory could apply to any action of a school official. If students can make a "federal case" out of every action by a school official by alleging that their substantive due process rights have been violated, that will make school discipline extremely difficult to administer.

Unfortunately, some lower federal courts have been responsive to attempts to

make a constitutional claim out of policy disagreement. They have ruled that the First Amendment bars a school from "using its own white middle class morality" in adopting rules of decorum. Fraser v. Bethel School District, 755 F.2d 1356 (9th Cir. 1985), rev'd 106 S.Ct. 3159 (1986). They have ruled that the Fourth Amendment bars a school district from enforcing school rules. State in Interest of T.L.O., 463 A.2d 934, rev'd 469 U.S. 325 (1985). They have viewed the Due Process Clause as barring a school district from interpreting its own rules. Wood v. Strickland, McCluskey, supra.

In Des Moines Independent School District v. Tinker, 393 U.S. 503 (1969), Fraser, T.L.O. and Ingraham, this Court has noted that the First Amendment, Fourth Amendment and Eighth Amendment rights of students in the context of the public

schools should be analyzed differently than in a criminal or other law enforcement context. Similarly, the Court has ruled that what constitutes procedural due process in the context of the public schools is different than in a court of law or other context outside the school. Goss v. Lopez, 419 U.S. 565 (1975).

The parameters of the constitutional "catchall" - substantive due process - in the context of the public schools remains unclear. Presently it is used by litigants to challenge any public policy or practice with which they do not agree.

The court of appeals below opines that it is required by Ingraham "to hold that, at some point, excessive corporal punishment violates the pupil's substantive due process rights." Petition for Writ of Certiorari at page A-5. The court quotes Ingraham to the effect that

"where school authorities...punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold at the Fourteenth Amendment liberty interests are implicated." Id. at A-5, citing, Ingraham, 430 U.S. at 674. The court then reaches the non sequitor that "[t]his language plainly indicates that the infliction of corporal punishment can affect a fundamental right susceptible to substantive due process protection." Id.

Under the lower court's rationale, a "fundamental right" for purposes of substantive due process, is coterminus with a "liberty" or "property" interest for purposes of procedural due process. If that is true, then the substance of any action of a public school official that affects a liberty or property interest of a student, employee or taxpayer is open to

scrutiny by the federal courts. The courts could be called upon to determine not only whether the school officials provided procedural due process in taking certain action, but the court will also decide whether the action itself was correct. Should a school be closed? Should a dress code be instituted? Should the school offer an AIDS education program? Is a ten day suspension for a drug offense too long?

It is questionable that the Framers of the Constitution, devoted as they were to grassroots control of local matters such as education, intended to empower the federal courts to second-guess the decisions of local school officials in every manner of activity, where the action does not raise an explicit constitutional entitlement such as free speech or equal protection.

This Court has been reluctant to announce a position on the question of the breadth of substantive due process in the schools. This Court has been understandably cautious in declining to review public school academic and disciplinary decisions outside the corporal punishment area under a substantive due process analysis, e.g. Wood v. Strickland, supra; Board of Education of Rogers, Arkansas v. McCluskey, supra; Board of Curators Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978).

But as long as the Court has not spoken, lower federal courts will continue their attempts to solve every perceived wrong.

E. Notwithstanding Ingraham v. Wright and Daniels v. Williams, plaintiffs continue to file cases involving "excessive" or unreasonable discipline in the federal courts.

Amicus has no policy on the subject of corporal punishment, either endorsing or opposing its use. That is because opinions of school boards across the country vary on the subject. But the question before the federal courts should not be whether the use of corporal punishment is good or bad. The question is whether an allegation of "excessive" or "unreasonable" use of corporal punishment implicates substantive due process.

Although this Court's decision in Ingraham v. Wright precludes suits under the Eighth Amendment and holds that state tort remedies satisfy procedural due process, plaintiffs continue to allege substantive due process violations in their challenges to school disciplinary measures. See, e.g., Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) (corporal

punishment); Hale v. Pringle, 562 F.Supp. 598 (M.D. Al., 1983) (corporal punishment); Brooks v. School Board of the City of Richmond, 569 F.Supp. 1534 (E.D. Va. 1983); (corporal punishment); Dickens v. Johnson County, 661 F.Supp. 155 (E.D. Tenn. 1987); (punishment "grossly disproportionate" to offense); De Falco v. Deer Lake School District, 663 F.Supp. 1108 (W.D. Pa. 1987) (deprivation of medical attention); Petrey v. Flaugher, 505 F.Supp. 1087 (E.D. Ky. 1981) (expulsion as excessive discipline); Rhodus v. Dumiller, 552 F.Supp. 425 (M.D. La. 1982) (corporal punishment); Myre v. Board of Education of Seneca Township High School District No. 160, 439 N.E.2d 74 (App. Ct Ill. 1982) (in-school suspension).

Even after Daniels v. Williams, plaintiffs continue their attempts to make

a federal case out of claims that are nothing more than common law torts. For example, in a recent case in Oklahoma plaintiffs were allowed to go to a jury and recover $134,000 in damages on a Section 1983 claim against the school district, charging "inadequate training, supervision and personnel investigative procedures" in the hiring and supervision of a teacher/coach who sexually abused three students. Complaint, D.T. et al. v. Epps and Independent School District No. 16 of Pawnee County, Oklahoma, C.A. 85-C-206 E (jury verdict, N.D. Ok. October 23, 1987). However heinous the conduct of the teacher, it is unclear as to how such facts present a federal constitutional question.

It requires no gift of prophecy to anticipate that, if the decision of the court of appeals is left undisturbed,

litigants will frame their substantive challenges to school disciplinary and policy decisions with sufficiently florid allegations to survive a motion to dismiss, embroiling the federal courts in numerous disputes that should have remained in the state court system. It is doubtful that the Framers of the Constitution intended to make every state action subject to federal court scrutiny merely through the mechanism of clever pleading.

According to the report of the Rodale Press, there are as many as two million incidents a year where students are physically disciplined, "Corporal Punishment in America's Schools" Rodale's Children's Magazine at 5 (Rodale Press, Inc., Emmaus, Pa. 1987). Given the continued wide use of corporal punishment across the country, cases such as the one

at bar are likely to increase. The lower courts need guidance from this Court as to whether an allegation of excessive corporal punishment implicates constitutional protections and, if so, whether the federal courts should look to the states to determine what is "reasonable" or develop their own standards.

CONCLUSION

Over the years this Court has expanded coverage under substantive due process so as to protect fundamental rights where the state provides no adequate remedy. Thus, most if not all substantive due process cases relate either to state treatment of criminals, who are not in a position to take advantage of state legal protections, or to state or local statutes, ordinances or codes which, on their face, implicate

fundamental rights. Neither of those situations exists here.

The Court has not ruled on the question of whether federal courts should intervene in decisions by local officials, such as public school officials, who have allegedly abused their authority under state law and where there is an adequate state remedy for such abuse.

Since important policy considerations are at issue here involving not only school discipline, but also the implementation of policy in a variety of other respects, Amicus urges the Court to review this important question.

Respectfully submitted,

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